Nos. 07-1059 and 07-1078

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EURODIF S.A., ET AL.

USEC, INC., ET AL., PETITIONERS

v.

EURODIF S.A., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

JOHN B. BELLINGER, III
Legal Adviser
Department of State
Washington, D.C. 20520

DANIEL J. DELL'ORTO
Acting General Counsel
Department of Defense
Washington, D.C. 20301

LILY FU CLAFFEE
General Counsel

JOHN D. MCINERNEY
Chief Counsel for Import Administration

DAVID R. MASON, JR.
Senior Counsel

QUENTIN M. BAIRD
Attorney
Department of Commerce
Washington, D.C. 20230

DAVID R. HILL
General Counsel
Department of Energy
Washington, D.C. 20585

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

GREGORY G. KATSAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

LEONDRA R. KRUGER
Assistant to the Solicitor General

JEANNE E. DAVIDSON
PATRICIA M. MCCARTHY
STEPHEN C. TOSINI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 1673 of Title 19 of the United States Code provides that, when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," to the detriment of a domestic industry, the Department of Commerce (Commerce) shall impose antidumping duties on entries of the foreign merchandise. The question presented is:

Whether the court of appeals erred in rejecting Commerce's conclusion that foreign merchandise is "sold in the United States" within the meaning of 19 U.S.C. 1673 when a purchaser in the United States obtains foreign merchandise by providing monetary payments and raw materials to a foreign entity that performs a major manufacturing process in which substantial value is added to the raw materials, thereby creating a new and different article of merchandise that is delivered to the U.S. purchaser.

PARTIES TO THE PROCEEDING

The petitioner in No. 07-1059 is the United States of America, which was the Defendant-Appellant in the court of appeals. The petitioners in No. 07-1078 are USEC Inc. and the United States Enrichment Corporation, which were Defendant-Intervenor-Appellants in the court of appeals.

Respondents who were Plaintiffs-Appellees below are Eurodif S.A., AREVA NC (formerly Compagnie Generale des Matieres Nucleaires), and AREVA NC, Inc. (formerly COGEMA, Inc.).

Respondent who was the Plaintiff-Intervenor-Appellee below is Ad Hoc Utilities Group.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provision involved 2
Statement 2
Summary of argument 18
Argument:
The Department of Commerce reasonably determined that imported low enriched uranium produced through separative work unit contracts is subject to antidumping duties 22
A. Commerce's interpretation of the antidumping-duty statute is entitled to deference 23
B. Commerce reasonably concluded that the antidumping-duty statute applies to imports of merchandise produced through contract manufacturing 25
1. Commerce's interpretation reflects a permissible reading of the statute's text 26
2. Commerce's interpretation effectuates the purposes of the antidumping-duty statute 32
3. Commerce's interpretation prevents evasion of the statute 34
4. Commerce's now-withdrawn tolling regulation provides no basis for rejecting the agency's statutory interpretation 39
C. Additional reasons identified by Commerce after reviewing the contracts and other record evidence support its decision to impose the antidumping duties at issue 44
1. Commerce reasonably disregarded the fiction that enrichers merely return the customer's unenriched uranium in enriched form 45

Table of Contents—Continued: Page

2. The court of appeals erred in assigning dispositive significance to the absence of contractual provisions explicitly vesting title in the enricher 50
Conclusion 53
Appendix 1a

TABLE OF AUTHORITIES

Cases:

B.A. Ballou & Co. v. *Citytrust*, 591 A.2d 126 (Conn. 1991) 49
Boulware v. *United States*, 128 S. Ct. 1168 (2008) 35
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 17, 18, 22, 23, 32, 43
Florida Power & Light Co. v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002) 16, 17, 26, 27
Frank Lyon Co. v. *United States*, 435 U.S. 561 (1978) . . . 35
Gray v. *Powell*, 314 U.S. 402 (1941) 29, 35
Huffman v. *Western Nuclear, Inc.*, 486 U.S. 663 (1988) 4
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 24
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 35
Morton v. *Ruiz*, 415 U.S. 199 (1974) 23
NSK Ltd. v. *United States*, 115 F.3d 965 (Fed. Cir. 1997) 13, 15
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 16, 17, 44

Cases—continued: Page

Pesquera Mares Australes Ltda. v. *United States*, 266 F.3d 1372 (Fed. Cir. 2001) 24
Powder Co. v. *Burkhardt*, 97 U.S. 110 (1878) 48, 49
SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969) . . . 35
Smiley v. Citibank (S.D.), N. A., 517 U.S. 735 (1996) 44
Sturm v. *Boker*, 150 U.S. 312 (1893) 49
Techsnabexport v. *United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007) 39
Thai Pineapple Pub. Co. v. *United States*, 187 F.3d 1362 (Fed. Cir. 1999), cert. denied, 529 U.S. 1097 (2000) 24
United Gas Improvement Co. v. *Continental Oil Co.*, 381 U.S. 392 (1965) 29, 35
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 24
United States v. *Winstar Corp.*, 518 U.S. 839 (1996) 52
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 24
Zuni Pub. Sch. Dist. No. 89 v. *Department of Educ.*, 127 S. Ct. 1534 (2007) 30

Agreement, statutes and regulations:

Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, Feb. 18, 1993, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921 . . . . . 37, 38
Antidumping Act of 1921, ch. 14, 42 Stat. 9 . . . . . 3, 32

Statutes and regulations—continued: Page

Bituminous Coal Act of 1937, 15 U.S.C. 828 *et seq.* (1940) 29
Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 16
41 U.S.C. 602(a) 27
Natural Gas Act, 15 U.S.C. 717 *et seq.* 29
Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1327, 102 Stat. 1184 (19 U.S.C. 1677(19)) 31
Tariff Act of 1930, Tit. VII, 19 U.S.C. 1673 *et seq.* 3, 32
19 U.S.C. 1673 . . . . . *passim*
19 U.S.C. 1673(1) 3, 16, 24, 30, 51
19 U.S.C. 1673(2) 4
19 U.S.C. 1673a(a) 3
19 U.S.C. 1673a(a)(1) 24
19 U.S.C. 1673a(b) 3
19 U.S.C. 1673a(e) 37
19 U.S.C. 1673b(d)(1)(B) 36
19 U.S.C. 1673b(d)(2) 36
19 U.S.C. 1673c(c) 39
19 U.S.C. 1673d(a)(1) 24
19 U.S.C. 1673d(c)(2) 4, 24
19 U.S.C. 1673e(a) 3
19 U.S.C. 1673e(a)(1) 4, 24
19 U.S.C. 1677(1) 3, 19, 23
19 U.S.C. 1677(2) 4
19 U.S.C. 1677(19) 31
19 U.S.C. 1677(19)(F) 31
19 U.S.C. 1677(34) 2, 3

Statutes and regulations—continued: Page

19 U.S.C. 1677(35)(A) 3
19 U.S.C. 1677a 3
19 U.S.C. 1677a(a) 42
19 U.S.C. 1677a(b) 42
19 U.S.C. 1677a(e) 37, 42
19 U.S.C. 1677b 3
19 U.S.C. 1677b(a)(1)(B) 43
19 U.S.C. 1677b(a)(1)(C) 43
19 U.S.C. 1677b(a)(4) 43
19 U.S.C. 1677b(c)(1) 43
19 U.S.C. 1677b(c)(2) 43
19 U.S.C. 1677b(e) 43
19 U.S.C. 1677b(e)(1) 33
Trade Agreements Act of 1979, Pub. L. 96-39, Tit. I, 93 Stat. 150 32
§ 106(a), 93 Stat. 193 . . . . . 3, 32
Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 602(b)(2), 98 Stat. 3024 30
USEC Privatization Act of 1996, 42 U.S.C. 2297h *et seq.* 6
19 U.S.C. 1516a(a)(2) 4
19 U.S.C. 1516a(b)(1)(B)(i) 4, 24
28 U.S.C. 1292(d). 15
28 U.S.C. 1581(c) 4
19 C.F.R. 351.401(a) 10, 40
19 C.F.R. 351.401(h) (2007) 9, 10, 39, 41

Miscellaneous: Page

73 Fed. Reg. 16,517 (2008) 9, 40
Final Results of Five-Year Sunset Review of Suspended Antidumping Duty Investigation on Uranium from the Russian Federation, 71 Fed. Reg. 32,517 (2006) 38, 39
H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. (1988) 31, 32
H.R. Rep. No. 1, 67th Cong., 1st Sess. (1921) 32
H.R. Rep. No. 725, 98th Cong., 2d Sess. (1984) 31
Issues and Decision Memorandum for the Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation (June 6, 2006) <http://ia.ita.doc.gov/frn/summary/ RUSSIA/E6-8758-1.pdf> 38
Low Enriched Uranium from France, 67 Fed. Reg. 6680 (Dep't of Commerce 2002) 12
Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 1080 (Dep't of Commerce 2001) 6
Low Enriched Uranium from the United Kingdom, Germany, and the Netherlands, 66 Fed. Reg. 65,886 (Dep't of Commerce 2001) 12
S. Rep. No. 249, 96th Cong., 1st Sess. (1979) 33
Staff of Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Print No. 98-219, Omnibus Tariff and Trade Measures: Explanation of Provisions Approved by the Committee on July 31, 1984, To Be Offered as a Committee Amendment to H.R. 3398* (Comm. Print 1984) 31

Miscellaneous—continued: Page

The American Heritage Dictionary of the English Language (1976) 28
The Random House Dictionary of the English Language (1966) 28
U.S. Int'l Trade Comm'n, *Pub. No. 3486, Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (2002) <http://hotdocs.usitc.gov/docs/pubs/701_731/pub3486.pdf> 12
Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan, 57 Fed. Reg. 49,220 (Dep't of Commerce 1992):
p. 49,235 38
p. 49,237 38
Webster's New International Dictionary of the English Language (2d ed. 1957) 28
Webster's Third New International Dictionary of the English Language (1993) 28

In the Supreme Court of the United States

No. 07-1059

UNITED STATES OF AMERICA, PETITIONER

v.

EURODIF S.A., ET AL.

No. 07-1078

USEC, INC., ET AL., PETITIONERS

v.

EURODIF S.A., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The final decision of the court of appeals (Pet. App. 1a-7a[1]) is reported at 506 F.3d 1051. The opinion of the court of appeals on interlocutory appeal (Pet. App. 8a-28a) is reported at 411 F.3d 1355, and its order denying a petition for rehearing on that appeal (Pet. App. 29a-35a) is reported at 423 F.3d 1275. The opinion of the

[1] References in this brief to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 07-1059.

Court of International Trade from which the interlocutory appeal was taken (Pet. App. 36a-68a) is reported at 281 F. Supp. 2d 1334, and its initial remand order (Pet. App. 178a-219a) is reported at 259 F. Supp. 2d 1310. The Department of Commerce's Notice announcing its preliminary determination in its antidumping investigation of low enriched uranium from France (J.A. 238-259) is reported at 66 Fed. Reg. 36,744, and its final determination (Pet. App. 220a-262a) is reported at 66 Fed. Reg. 65,877. Its decision on first remand from the Court of International Trade (Pet. App. 69a-177a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. On December 11, 2007, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including January 22, 2008. On January 14, 2008, the Chief Justice further extended the time to and including February 15, 2008, and the petitions for a writ of certiorari in No. 07-1059 and No. 07-1078 were filed on that date. The petitions were granted and the cases were consolidated on April 21, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1673 of Title 19 of the United States Code is reproduced in the appendix to this brief. App., *infra*, 1a.

STATEMENT

1. In international trade law, the practice of exporting goods to another country to be sold at less than their fair value—*i.e.*, the price for which they are sold in the producer's home market, or their cost of production—is known as "dumping." See 19 U.S.C. 1677(34). For

almost a century, Congress has provided a remedy to domestic industry harmed by the dumping of foreign goods in the United States. See Anti-Dumping Act, 1921, ch. 14, 42 Stat. 9, repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 193; Tariff Act of 1930, Tit. VII, 19 U.S.C. 1673 *et seq*. The antidumping-duty statute provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," 19 U.S.C. 1673(1), duties must be imposed on the merchandise in the amount of the difference between the "normal value" of the merchandise (generally the price of the good at home) and its "export price" (generally the price at which the good is sold to an unaffiliated U.S. purchaser). 19 U.S.C. 1673, 1673e(a), 1677a, 1677b. That difference is known as the "dumping margin." 19 U.S.C. 1677(35)(A).

The Department of Commerce (Commerce) has statutory responsibility for administering the antidumping-duty statute. 19 U.S.C. 1677(1). If an interested party, including a member of a domestic industry, petitions Commerce, or if Commerce independently determines that the statutory criteria are met, Commerce must undertake a formal investigation to determine whether antidumping duties should be imposed on a particular class or kind of imported merchandise. 19 U.S.C. 1673a(a) and (b). Commerce imposes antidumping duties if two independent determinations are made. First, Commerce must determine that the subject merchandise was "sold in the United States for less than its fair value," or "dumped," during a period of investigation. 19 U.S.C. 1673(1); see 19 U.S.C. 1677(1) and (34). Second, the International Trade Commission (ITC) must determine that the domestic industry was materially

injured or threatened with material injury by virtue of dumped imports. 19 U.S.C. 1673(2); see 19 U.S.C. 1677(2). If both those determinations are made, Commerce issues an antidumping-duty order directing U.S. Customs and Border Protection (Customs) to assess duties on the merchandise in an amount equal to the dumping margin. 19 U.S.C. 1673d(c)(2), 1673e(a)(1).

An interested party may challenge a final antidumping-duty determination before the Court of International Trade (CIT) pursuant to 19 U.S.C. 1516a(a)(2) and 28 U.S.C. 1581(c). Commerce's determination must be sustained unless "unsupported by substantial evidence on the [administrative] record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B)(i).

2. This case concerns the application of the antidumping-duty statute to imports of low enriched uranium (LEU). LEU is a critical component for the production of nuclear power. It is produced by converting natural uranium—that is, mined uranium that has been milled or refined—to uranium hexafluoride gas, then subjecting the uranium hexafluoride to a process of isotope separation that increases the concentration of the fissionable isotope U^{235}, or "assay," to a desired level. By weight, the concentration of U^{235} in natural uranium is approximately 0.711%. Most nuclear utilities require fuel with an assay between 3% and 5%. The process of increasing the concentration of U^{235} is known as "enrichment." Once the uranium has been enriched, the finished LEU is fabricated into fuel rods, which are used in nuclear reactors to generate power. Pet. App. 9a, 181a-183a, 230a-231a; cf. *Huffman* v. *Western Nuclear, Inc.*, 486 U.S. 663, 665 n.2 (1988) (describing the uranium enrichment process).

The "amount of energy or effort required to separate [*i.e.*, increase the concentration of] a given quantity of feed uranium into LEU" is measured in "separative work units," or "SWUs." Pet. App. 183a. The amount of LEU that can be produced from a given quantity of feed uranium varies in proportion to the quantity of SWUs applied. The same amount of LEU can be produced by using more feed uranium and applying fewer SWUs, or by using less feed uranium and applying more SWUs. J.A. 80-81.

Utilities in the United States generally acquire LEU from uranium enrichers in one of two ways. First, utilities may enter into contracts in which they agree to pay the enricher for a specified quantity of LEU at a given assay. Such contracts are known as "enriched uranium product," or "EUP," contracts. Second, utilities may enter into contracts in which they agree to arrange for the delivery of a quantity of unenriched uranium (known as "feed") to an enricher, and pay the enricher for the number of SWUs to be applied to create LEU. Such contracts are known as "SWU" contracts. Pet. App. 182a-184a.[2] This case concerns the treatment of the latter type of contracts—SWU contracts—under the antidumping-duty statute.

3. a. In December 2000, petitioners USEC Inc. and United States Enrichment Company (collectively, USEC) filed with Commerce a petition alleging that LEU imports from France, as well as other European

---

[2] SWU contracts became common in the uranium enrichment industry in the 1960s and 1970s, when the U.S. government "had a monopoly on enrichment services, but offered no other services relating to the production of nuclear fuel." Pet. App. 186a. Utilities accordingly purchased feed uranium from third parties to be enriched by the U.S. government. *Ibid.*

countries, were being, or were likely to be, sold in the United States at less than fair value. J.A. 39.[3] USEC is a private, for-profit corporation that has assumed enrichment operations formerly performed by the Department of Energy. See USEC Privatization Act, 42 U.S.C. 2297h *et seq.* It is now the only enricher of uranium in the United States. Pet. App. 9a. USEC alleged that, as a result of the unfair pricing of the imported LEU, the domestic enrichment industry was materially injured. Commerce commenced an investigation. *Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 1080 (2001) (notice of initiation of antidumping investigation).

b. At the outset of its investigation, Commerce invited interested parties to comment on the investigation's scope. 66 Fed. Reg. at 1080. Although no party disputed that LEU acquired pursuant to EUP contracts was potentially subject to antidumping duties, respondent Ad Hoc Utilities Group (AHUG), a group of utilities in the United States that purchase and utilize both imported and domestic LEU, argued that Commerce should exclude imported LEU acquired pursuant to SWU contracts from the investigation because SWU contracts "constitute the provision of services, not the production or sale of goods subject to the antidumping law." J.A. 243. Commerce preliminarily determined that, because "there is little substantive commercial difference" between EUP transactions and SWU transactions, LEU acquired pursuant to both types of contracts fell within the scope of the investigation. J.A. 245. Com-

[3] References in this brief to "J.A." are to the Joint Appendix. References to "C.J.A." are to the Confidential Joint Appendix.

merce, however, invited further comments on the issue. J.A. 247.

c. In December 2001, Commerce issued its final determination that LEU from France was being sold, or likely to be sold, in the United States at less than fair value. Pet. App. 220a-262a. In that determination, Commerce concluded that all LEU imported from France is subject to the antidumping law, "regardless of whether the sale is structured as one of enrichment processing." *Id.* at 231a. Although the structure of the transaction may be relevant to the calculation of the duties to be imposed on the good, Commerce concluded that it "is not relevant to the issue of whether the [antidumping] law is applicable" in the first instance. *Id.* at 230a.

Commerce found that "the enrichment of uranium accounts for approximately 60 percent of the value of the LEU entering the United States," and that "enrichment processing adds substantial value to the natural uranium and creates a new and different article of commerce." Pet. App. 238a-239a. Commerce explained that "it is the enricher who creates the essential character of the LEU. The enrichment process is not merely a finishing or completion operation, but is instead the most significant manufacturing operation involved in the production of LEU," and "creat[es] a clearly distinct product from uranium feedstock." *Id.* at 251a. Having found that "the enrichment process is a major manufacturing operation for the production of LEU" that results in "substantial transformation of the uranium feedstock," Commerce concluded that "the LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries," and, when delivered to a U.S. customer at

less than its fair value, is subject to the antidumping law. *Id.* at 229a-230a.

Commerce rejected arguments that the antidumping-duty law does not apply to LEU produced pursuant to SWU contracts because enrichers do not sell merchandise, but rather sell enrichment "services." Pet. App. 228a, 230a. Noting that "enrichment services" are a "component of LEU," *id.* at 228a, Commerce concluded that, rather than merely paying for a "service[]," utilities that acquire LEU pursuant to SWU contracts also purchase merchandise, *id.* at 231a.

Commerce explained that enrichment processing is not merely a "'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services," because enrichment is "a major manufacturing operation" that "result[s] in subject merchandise being introduced into the commerce of the United States." Pet. App. 231a, 239a-240a. Commerce concluded that, although it is always possible to contract separately for the purchase of raw materials and manufacturing "services," when a "purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product," it has purchased the finished product. *Ibid.* Commerce also found it significant that enrichers do not use the specific feedstock furnished by a utility to produce LEU for that utility, and that enrichers, not the utilities, control the production process. *Id.* at 227a, 247a.

Commerce found further support for its conclusion in the purposes underlying the antidumping-duty statute. It explained:

> [T]he unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the [antidumping] laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading system as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the [trade] laws.

Pet. App. 239a.

Commerce further rejected arguments that the regulation then in force concerning the treatment of entities engaged in so-called "tolling" (*i.e.*, subcontracting) operations precluded application of antidumping duties to imported LEU obtained through SWU transactions. That regulation, which has recently been withdrawn, provided that Commerce will "not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise." 19 C.F.R. 351.401(h) (2007), withdrawn by 73 Fed. Reg. 16,517 (2008). In its determination, Commerce explained that the regulation was not "relevant or applicable in determining whether merchandise entering the United States is subject to" the antidumping-duty. Pet. App. 235a. Rather, Commerce explained, Section 351.401(h) was a subsection of a regula-

tion that "was intended to 'establish certain general rules that apply to the calculation of export price, constructed export price and normal value,' and not for purposes of determining whether the [antidumping or other trade] laws are applicable" in the first instance. *Ibid.* (quoting 19 C.F.R. 351.401(a)). Commerce acknowledged that it had previously applied the tolling regulation to classify a subsequent sale of the merchandise by a tollee or contractor (*i.e.*, the entity obtaining the tolled merchandise from the toller or subcontractor), rather than the sale made by the toller or subcontractor, as the "relevant sale" for purposes of calculating the dumping margin. Pet. App. 235a. But the agency noted that it had "never applied, nor relied upon, section 351.401(h) to exempt merchandise from [antidumping] proceedings." *Ibid.*

Against this background, Commerce found that enrichers make a "relevant sale" for purposes of calculating the dumping margin, regardless of the structure of the transaction. Pet. App. 250a-251a. Commerce found that the object of a SWU contract, like the object of an EUP contract, is for "an exact amount of LEU to be delivered [by the enricher to the utility] over the life of the contract." *Id.* at 253a. "And it is this bottom line (*i.e.*, a precise amount of LEU delivered over the life of the contract) that forms the fundamental nature of the agreement between buyer and seller in a SWU contract." *Ibid.* Accordingly, Commerce concluded that "the contracts designated as SWU contracts are functionally equivalent to those designated as EUP transactions," and that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *Id.* at 254a, 255a.

In particular, Commerce noted that, under both types of transactions, "utility customers are not concerned with how LEU is produced or the amount of work expended (SWU) to produce such LEU. Instead, utility customers are interested in obtaining a specific quantity of a standardized product at a specified product assay." Pet. App. 255a. "[U]nder both types of contracts, * * * the enricher ultimately determines how much uranium feed is used, [and] the amount of SWU actually applied," among other aspects of the production process. *Id.* at 256a. Moreover, Commerce noted, "for both types of contracts[,] ownership of the LEU is only transferred to the utility customer upon delivery of the LEU. Consistent with this provision, for both types of transactions, the enricher incurs the risk of loss with respect to the LEU." *Ibid.*

Finally, Commerce explained, "the enrichment companies engage in the most significant portion of the production of LEU, and thus the value of enrichment is beyond question the most significant element of value in determining the price of LEU." Pet. App. 256a-257a. Commerce accordingly determined that "the pricing behavior of the enrichment companies in these transactions is relevant to the Department's determination." *Id.* at 257a. To isolate the enrichers' pricing behavior, Commerce calculated the dumping margin by comparing the value of the complete LEU product acquired by U.S. customers via SWU contracts with the normal value of LEU, using the same value for the natural uranium component of LEU "on both sides of the equation." *Ibid.* Thus controlling for the cost of raw materials in SWU transactions, Commerce determined that LEU from

France was being sold in the United States at less than its fair value. *Ibid.*[4]

d. In February 2002, the ITC determined that imports of LEU from France at less than fair value had a significant negative effect on USEC, the only domestic producer of LEU. The ITC accordingly determined that an industry in the United States was materially injured by imports of LEU from France at less than fair value. See U.S. Int'l Trade Comm'n, *Pub. No. 3486, Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (2002) <http://hotdocs.usitc.gov/docs/pubs/701_731/pub3486.pdf> (determination and views of the Commission). Shortly thereafter, Commerce issued an order imposing antidumping duties on LEU from France. *Low Enriched Uranium from France*, 67 Fed. Reg. 6680 (Dep't of Commerce 2002) (notice of amended final determination of sales at less than fair value and antidumping-duty order).

4. a. Respondent Eurodif, S.A., a French enricher of uranium, challenged Commerce's final determination, along with its owner, respondent Compagnie General des Matieres Nucleaires (now AREVA NC), and its U.S. subsidiary, respondent COGEMA, Inc. (now AREVA NC, Inc.). The CIT remanded the matter to Commerce for further explanation, focusing upon Commerce's determination that its tolling regulation did not apply to SWU transactions. Pet. App. 178a-219a. Although the CIT acknowledged that the tolling regulation does not

---

[4] In a separate determination, Commerce concluded that LEU from the United Kingdom, Germany, and the Netherlands, was not being sold or likely to be sold at less than fair value. *Low Enriched Uranium from the United Kingdom, Germany, and the Netherlands*, 66 Fed. Reg. 65,886 (2001) (notice of final determination of sales at not less than fair value).

"exempt merchandise from [antidumping] proceedings," the court concluded that the regulation is nevertheless relevant because "a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins." *Id.* at 206a (citation omitted). The CIT determined that the circumstances of this case resembled previous cases in which Commerce had examined tolling arrangements providing for a tollee to furnish raw materials to a toller, which in turn produced and delivered a finished product to the tollee. *Id.* at 197a. Noting that Commerce had determined in those cases that the tolling transaction is not a "relevant sale" for purposes of calculating the dumping margin, *id.* at 190a-192a & n.9, the court ruled that Commerce's decision not to apply the tolling regulation in this case "require[d] a more persuasive explanation than provided in the agency's determinations." *Id.* at 207a.

b. In its determination on remand, Pet. App. 69a-177a, Commerce provided further explanation of its conclusion that the tolling regulation did not apply to SWU transactions. The agency explained that the regulation did not apply because, *inter alia*, "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." *Id.* at 126a. And it further explained that SWU transactions are "sales" as the Federal Circuit had defined the term in *NSK Ltd.* v. *United States*, 115 F.3d 965 (Fed. Cir. 1997), in which it held that the term "requires both a transfer of ownership to an unrelated party and consideration." Pet. App. 134a (quoting *NSK Ltd.*, 115 F.3d at 975). Commerce determined that SWU transactions qualify as "sales" under that definition because, among

other things, "these sales represent the transfer of ownership in the complete LEU product for consideration." *Id*. at 131a.

Specifically, "[b]ased upon the contracts and other evidence of record," Pet. App. 131a, Commerce found that "[t]he enrichers transfer ownership of, and title to, the LEU to the utilities upon delivery of the merchandise for consideration." *Ibid*. By contrast, "utility customers hold title to the natural uranium feedstock that they provide to the enrichers," and it is only "[a]t the time of delivery" that "title to the LEU is transferred to the customer, and [the customer's] title to the feed material is extinguished." *Id.* at 132a. Moreover, Commerce explained, because the enricher treats natural uranium feedstock as fungible, before delivery of LEU "[t]he customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU," because the "LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." *Id.* at 133a. Indeed, Commerce found that "LEU delivered to a utility customer by an enricher under an enrichment contract may be produced *before* any natural uranium supplied by that customer could have been part of the production process for that LEU," thereby making it "impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Ibid.* (emphasis added).

Based upon those findings, Commerce concluded that, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a.

Commerce further found "that enrichers make a * * * sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration." *Id.* at 134a (citing *NSK Ltd.*, 115 F.3d at 973 (Fed. Cir. 1997)); see *NSK Ltd.*, 115 F.3d at 975.

c. The CIT reversed. Pet. App. 36a-68a. The court rejected Commerce's conclusion that enrichers obtain ownership of LEU enriched under SWU contracts, reasoning that "although the enrichers obtain the right to use and possess the feedstock, and assume the risk of loss or damage, there is no evidence that they ever obtain ownership of either the feed uranium or the final enriched product." *Id.* at 44a. The court therefore held that the transfer of LEU from the enricher to the utility cannot constitute a relevant "sale," *id.* at 45a (citing *NSK Ltd.*, 115 F.3d at 975), and that Commerce's contrary determination was neither supported by substantial evidence nor in accordance with law, *id.* at 46a. The court certified the question for interlocutory appeal under 28 U.S.C. 1292(d). 27 Ct. Int'l Trade 1925 (2003).[5]

4. a. The court of appeals affirmed. Pet. App. 8a-28a. Without addressing the question of "relevant sales" under the tolling regulation, the court held that LEU acquired pursuant to SWU transactions is not "merchandise * * * sold" within the meaning of Section 1673, and thus is not subject to antidumping duties, however calculated. *Id.* at 17a-24a.

---

[5] The CIT rejected Commerce's determination that the tolling provision is altogether inapplicable in this case, Pet. App. 50a-56a, but held that Commerce acted reasonably in declining to apply the tolling provision in determining the members of the affected domestic industry, *id.* at 56a-59a.

The court of appeals reasoned that Section 1673 covers "the sale of goods (or 'merchandise')," but not "[t]he provision of services." Pet. App. 17a. The court concluded that, because SWU contracts are contracts for the provision of services, not for the sale of goods, LEU that enters the United States pursuant to SWU contracts is not "merchandise * * * sold" within the meaning of 19 U.S.C. 1673(1). *Id.* at 17-24a.

In reviewing the contracts, the court of appeals agreed with the CIT's conclusion that "the SWU contracts do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU." Pet. App. 20a. It thus agreed with the CIT that, under the transfer-of-ownership definition of "sale" set out in *NSK Ltd.*, SWU transactions cannot be said to constitute "sales" of merchandise for purposes of the antidumping-duty statute. *Ibid.* The court also found support for its conclusion in its earlier decision in *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364 (Fed. Cir. 2002). Pet. App. 20a-24a. In that case, the Federal Circuit had held that, although SWU contracts do not clearly constitute either contracts for services or contracts for goods—because they do "not fall neatly" into either category—they are "best characterized" as service contracts for purposes of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* *Florida Power & Light Co.*, 307 F.3d at 1373.

b. While the government's petition for rehearing was pending, this Court issued its decision in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), which held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to * * * deference only if the prior court decision holds that its construction

follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. The government brought the *Brand X* decision to the attention of the court of appeals, explaining that the court's reliance upon *Florida Power & Light Co.* was inconsistent with the principles of agency deference that the Court reaffirmed in *Brand X*. In an order denying rehearing, Pet. App. 29a-35a, the court rejected that argument, stating that it had not considered itself "bound" by *Florida Power & Light Co.*, but had treated it only as "'persuasive' authority" in holding that SWU contracts are contracts for services, not for the sale of goods. *Id.* at 32a. The court further held that Commerce's construction of Section 1673 did not, in any event, warrant deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because "the antidumping duty statute unambiguously applies to the sale of goods," and not "contracts for services." Pet. App. 31a, 33a.

Notwithstanding its previous acknowledgment that certain SWU contracts did "not fall neatly" into either the goods or services category, *Florida Power & Light Co.*, 307 F.3d at 1373, the court of appeals now found that "it is clear that [the SWU] contracts are contracts for services and not goods," Pet. App. 33a. The court based that conclusion upon "the critical importance" of what it characterized as "the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ('LEU') product." *Ibid.* In the court's view, "the inescapable conclusion flowing from this circumstance is that the enrichers do not 'sell' LEU to utilities

pursuant to the SWU contracts at issue in this case." *Id.* at 33a-34a.

6. On remand, the CIT determined that the court of appeals' decision required Commerce to rewrite the scope of its antidumping order with respect to future LEU entries, as well as to exclude past LEU entries covered by SWU contracts from its duty calculations. 431 F. Supp. 2d 1351, 1354-1355 (2006) (per curiam); 442 F. Supp. 2d 1367 (2006) (per curiam). Although the government complied, under protest, with the CIT's order with respect to past entries of LEU, it appealed the CIT's conclusion with respect to future entries. See Gov't C.A. Br. in Nos. 07-1005 & 07-1006, at 3. The court of appeals found those issues not ripe for review and dismissed the appeal. Pet. App. 1a-7a.

SUMMARY OF ARGUMENT

The Department of Commerce reasonably concluded that the antidumping remedy is available when utilities in the United States acquire imported, foreign-produced LEU for less than its fair value, and that the remedy does not become unavailable simply because the parties structure the transaction as separate purchases of raw materials and of essential manufacturing processes, rather than as a one-step exchange of cash for finished product. That conclusion is consistent with the text of the statute and its context. In addition, as Commerce determined, a contrary conclusion would not only be inconsistent with the remedial purposes of the statute, but would also open a loophole that would encourage widespread evasion of the unfair trade laws. Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the agency's statutory interpretation is reasonable and should be upheld.

A. As the "administering authority" under the antidumping-duty statute, 19 U.S.C. 1677(1), Commerce is charged with investigating and adjudicating allegations that foreign goods are being dumped in the United States. The scope of Commerce's authority under the antidumping-duty law establishes that Congress intended Commerce to speak with the force of law on the meaning of the statute. Commerce's reasonable interpretation of the statute therefore warrants *Chevron* deference, and must be sustained unless unambiguously foreclosed by the text of the statute.

B. Commerce in this case reasonably determined that imported LEU produced pursuant to SWU contracts, like any imported good produced pursuant to similar contract-manufacturing arrangements, is subject to antidumping duties if it is acquired for less than its fair value. Under the statute, if an item manufactured abroad is delivered to a customer in the United States in exchange for monetary or other consideration, that merchandise has been "sold" in the United States, and therefore is subject to the antidumping-duty statute. The structure of the underlying transaction does not change that result.

Nothing in the statute's reference to sales of merchandise unambiguously forecloses Commerce's interpretation. The statute does not ask whether a particular contract between a foreign manufacturer and a U.S. purchaser is better characterized as a contract for the sale of goods or a contract for the "service" of manufacturing goods; it asks whether the goods are being, or are likely to be, "sold" in the United States at less than their fair value. This Court's cases have recognized that statutory references to "sales" of particular commodities may encompass various transactions that result in the delivery

of the commodity for a price, and that administrative agencies are entitled to disregard the form of the transaction where necessary to effectuate the policies of the statute. In this case, statutory context confirms that Congress did not intend Section 1673's reference to "merchandise * * * sold" to have a narrower scope.

Commerce's decision not to treat imported merchandise produced via contract-manufacturing arrangements as beyond the reach of the antidumping-duty statute advances the purpose of the statute: to remedy the harm to domestic manufacturing industry that results from unfairly priced foreign products. That harm is not lessened in the case of contract-manufactured goods. Regardless of the structure of the transaction, if a domestic purchaser acquires foreign merchandise at less than its fair value, the harm to the integrity of the domestic market and the viability of domestic industry is the same.

Commerce's decision also prevents circumvention of the unfair trade laws. Domestic sales of virtually all manufactured merchandise could be structured as separate purchases of raw materials and manufacturing "services," in the same manner as SWU transactions. A rule that treated the structure of contract-manufacturing arrangements as dispositive would naturally encourage foreign manufacturers and their domestic customers to restructure their transactions to avoid imposition of antidumping duties.

The prospect of such evasion is a matter of particular concern in the sensitive context of trade in enriched uranium. The effective implementation of the antidumping-duty statute in that context is a matter of considerable importance to U.S. national security and foreign policy interests, and, in particular, serves as the foundation for

a key element of the Nation's nuclear nonproliferation policy. The courts should be particularly reluctant to second-guess the agency's judgment on the proper implementation of the antidumping law in this context.

C. Even if Commerce were not entitled to conclude that purchases of imported, contract-manufactured goods categorically fall within reach of the antidumping-duty statute, Commerce identified several salient features of the specific contract-manufacturing arrangements at issue in this case that make it particularly clear that LEU acquired pursuant to SWU transactions may properly be said to have been "sold" within the meaning of Section 1673. Most critically, although SWU contracts operate based on a legal fiction that the enricher merely performs the "service" of enriching a customer's feed uranium, the fiction is just that: enrichers treat feedstock as fungible, and although utilities retain title to the quantity of feedstock they supplied to the enricher throughout the enrichment process, they do not obtain title to the LEU for which they had contracted immediately upon production of the LEU. The result is that a utility that started out with title to a particular lot of raw materials ends up with title to a different lot of finished merchandise. As Commerce reasonably determined, the overall arrangement is one for the transfer of ownership of the finished LEU product for consideration in the form of raw materials and cash. Such an arrangement is reasonably regarded as a "sale" of "merchandise."

The court of appeals erred in concluding that, despite the fact that customers do not obtain title to the finished LEU upon production, and despite the fact that the finished LEU bears no necessary relationship to any raw materials provided by the customer, LEU produced pur-

suant to SWU transactions is unambiguously exempt from antidumping duties because the contracts do not evidence the parties' intention to vest ownership of raw materials or of the finished product in the enricher. That conclusion directly contradicts Commerce's reasonable determination that, when title passes *to* the customer, it passes *from* the enricher. But in any event, the question of contractual vesting of title in the enricher is beside the point; the statute, which uses the word "sold" in the passive, is concerned with the ultimate disposition of merchandise that enters the commerce of the United States. It is not concerned with the parties' private documents or contractual intentions with respect to the manufacturer's ownership rights.

ARGUMENT

THE DEPARTMENT OF COMMERCE REASONABLY DETERMINED THAT IMPORTED LOW ENRICHED URANIUM PRODUCED THROUGH SEPARATIVE WORK UNIT CONTRACTS IS SUBJECT TO ANTIDUMPING DUTIES

This Court has long held that courts are to accord deference to "reasonable interpretation[s]" of a statute adopted by the agency that has been "charged with responsibility for administering the provision." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844, 865 (1984). The treatment of imported LEU purchased pursuant to SWU transactions under the antidumping-duty statute is an issue as to which the statute is silent, and which implicates U.S. national security and foreign policy interests that the Executive, rather than the Judiciary, is in the best position to assess. Under *Chevron*, Commerce's final determination that such LEU transactions

are subject to the antidumping-duty statute is reasonable and therefore should be upheld.

A. Commerce's Interpretation Of The Antidumping-Duty Statute Is Entitled To Deference

In *Chevron*, this Court explained that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). The Court accordingly held that, while courts "must give effect to the unambiguously expressed intent of Congress" if "Congress has directly spoken to the precise question at issue," courts must defer to the responsible agency's interpretation of the statute if "the statute is silent or ambiguous with respect to the specific issue" and the agency has acted reasonably in filling the statutory gap. *Id.* at 842-843.

It is undisputed that the antidumping-duty statute does not directly speak to the precise question at issue —*i.e.*, whether the statute exempts goods that U.S. consumers acquire through contract-manufacturing arrangements, and that enter the United States at less than fair value. As a result, this case turns on the application of *Chevron*'s second step, and the deference principles articulated in *Chevron* are fully applicable in this case.

Congress has conferred on Commerce the power to administer the antidumping-duty statute. 19 U.S.C. 1677(1). Commerce is statutorily responsible for investigating allegations that imported merchandise is being, or is likely to be, dumped in the United States; for making final determinations regarding sales at less than fair

value; and ultimately for issuing orders imposing antidumping duties to remedy such unfair trade practices. 19 U.S.C. 1673(1), 1673a(a)(1), 1673d(a)(1) and (c)(2), 1673e(a)(1).

As the Federal Circuit has recognized, "[a]ntidumping investigations are complex and complicated matters in which Commerce has particular expertise," *Pesquera Mares Australes Ltda.* v. *United States*, 266 F.3d 1372, 1379 (2001) (quoting *Thai Pineapple Pub. Co.* v. *United States*, 187 F.3d 1362, 1367 (Fed. Cir. 1999), cert. denied, 529 U.S. 1097 (2000)), and are "fairly characterized as 'relatively formal administrative procedure[s]' that adjudicate parties' rights," *id.* at 1381 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001)). Commerce's "decisions are, moreover, self-executing (that is, binding without the need for judicial enforcement), another indication of *Chevron* entitlement." *Id.* at 1382. When an interested party seeks judicial review, the court reviews Commerce's factual findings under a deferential "substantial evidence" standard, which requires a court to uphold an agency's findings unless no reasonable factfinder could agree with them. 19 U.S.C. 1516a(b)(1)(B)(i); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 484 (1992); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951).

The scope of Commerce's authority under the antidumping-duty statute makes clear that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Commerce's construction of the statute, articulated in the course of formal antidumping proceedings, is entitled to *Chevron* deference. See *ibid.*

B. Commerce Reasonably Concluded That The Antidumping-Duty Statute Applies To Imports Of Merchandise Produced Through Contract Manufacturing

As discussed above, Commerce began its analysis in this case by observing that the enrichment of uranium, though often referred to as a "service," Pet. App. 239a, is not "a 'service' in the same sense that activities such as accounting, banking, insurance, transportation, and legal counsel are considered by the international trading community to be services," *id.* at 240a—or in the same sense that, for example, the "cleaning of a suit" is a "service," *id.* at 230a. Rather, Commerce found, uranium enrichment is a "major manufacturing operation," *id.* at 229a, that results in the "substantial transformation" of unenriched uranium to "create[] a new and different article of commerce," *id.* at 239a-240a. Whereas, "[i]n the case of cleaning services, the cleaner merely returns to its customer a cleaned suit," in the case of uranium enrichment pursuant to SWU contracts, the enricher delivers to the customer an item of commerce that is "a clearly distinct product" from any raw materials that had been delivered to the enricher. *Id.* at 230a-231a, 239a, 251a.

In Commerce's considered view, a U.S. customer's acquisition of finished merchandise from a foreign manufacturer in exchange for payment constitutes a "sale" of "foreign merchandise" under Section 1673, regardless of whether, under the particular form of the contract, the U.S. customer purchased the merchandise in a single transaction, with a single price term covering all elements of the value of the merchandise, or separately purchased raw materials and a manufacturing process that transforms the materials into the desired merchan-

dise. Commerce determined that, for purposes of the antidumping-duty law, the structure and form of the transaction is less important than its substance. Pet. App. 240a. In a so-called "contract-manufacturing" transaction, as in a familiar one-step exchange of cash for the finished product, the overall arrangement is dedicated to the delivery of the finished product, and thus is, "in effect, an arrangement for the purchase and sale" of merchandise. *Id.* at 254a. That conclusion reflects a permissible interpretation of the statutory text, and a reasonable policy choice that effectuates the purposes of the law. Under *Chevron*, Commerce's determination should have been upheld.

1. Commerce's interpretation reflects a permissible reading of the statute's text

Commerce's interpretation satisfies the first step of the *Chevron* analysis: it reflects a permissible reading of the statutory text.

a. In holding that Commerce's reading of the statute was unambiguously foreclosed by the text of Section 1673, the court of appeals reasoned that Section 1673 unambiguously "applies to the sale of goods" and not "contracts for services." Pet. App. 33a. The unstated assumption underlying that decision is that the determination whether "merchandise" is "sold" for purposes of Section 1673 is limited to an examination of the terms of the contract between the manufacturer and purchaser to determine whether the monetary payment term is written as covering the entire value of the finished product, or only the value of the "service" of producing that product. See *id.* at 23a-24a (citing *Florida Power & Light Co.* v. *United States*, 307 F.3d 1364, 1373-1374 (Fed. Cir. 2002)). The consequence of that approach is that, if the

parties do not provide for the purchase of all of the components of the finished merchandise in a single contract, but instead structure the transaction as separate purchases of raw materials and manufacturing "services," then the finished merchandise is immune from the antidumping-duty statute. That is true even though the parties to the contract-manufacturing arrangement, as well as the domestic industry, are effectively in the same position in which they would be had the transaction been structured as a single-step sale of finished merchandise: The domestic entity has acquired merchandise from abroad at below its fair value, and domestic competitors of the foreign producer have lost their fair chance to compete.

Nothing in Section 1673 unambiguously limits the reach of the antidumping-duty law to foreign merchandise acquired via a single-step exchange of cash for finished product. Nor does the text of the statute unambiguously exclude goods acquired through contracts that provide in part for the "service" of manufacturing. Unlike, for example, the statute at issue in the Federal Circuit's prior decision in *Florida Power & Light Co.*, *supra*, which explicitly called for an inquiry into whether a SWU contract qualified as a "contract * * * for * * * the disposal of personal property," Contract Disputes Act of 1978, 41 U.S.C. 602(a), Section 1673 contains no such mandate. See *Florida Power & Light Co.*, 307 F.3d at 1373-1374. Indeed, the word "contract" does not appear anywhere in the provision. The words that do appear— and, in particular, the statutory reference to "merchandise * * * sold"—are capable of bearing the meaning Commerce assigned them.

In ordinary usage, the verb "sell," when used in connection with real or personal property, refers broadly to

the act of giving up, transferring, exchanging, or disposing of property for consideration. See *Webster's Third New International Dictionary of the English Language* 2061 (1993) (defining "sell" as "to give up (property) to another for money or other valuable consideration: hand over or transfer title to (as goods or real estate) for a price"); *Webster's New International Dictionary of the English Language* 2272 (2d ed. 1958) (defining "sell" as "[t]o transfer (property) for a consideration; to transfer the absolute or general title to (anything, as lands, goods, choses in action) to another for a price, or sum of money; to give up for a valuable consideration; to dispose of in return for something; to convey"); *The American Heritage Dictionary of the English Language* 1177 (1976) (defining "sell" as "[t]o exchange or deliver for money or its equivalent"); *The Random House Dictionary of the English Language* 1296 (1966) (defining "sell" as "to give up or make over to another for a consideration; dispose of to a purchaser for a price"). Section 1673 uses the verb "to sell" in the passive voice. It thus refers to merchandise that has been given up, transferred, delivered, or disposed of to another, for consideration.

A reasonable reading of the statute is that, when a foreign manufacturer delivers a newly produced good to a customer in the United States for monetary or other valuable consideration, that good is "sold" within the meaning of Section 1673 and thus potentially subject to antidumping duties. Commerce's reading of the statutory language to cover goods produced by contract manufacturing is consistent with the way other statutory references to the "sale" of particular commodities have been interpreted. This Court's cases have recognized that such references may encompass various transac-

tions that result in the delivery of the commodity to a purchaser for a price, and that administrative agencies are entitled to disregard the form of the transaction where necessary to carry out the relevant statutory scheme. In *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965), for example, the Court held that sales of leases of land containing gas reserves constitute "'sales' of natural gas in interstate commerce" for purposes of establishing Federal Power Commission jurisdiction under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, reasoning that "[a] regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." 381 U.S. at 400.

United Gas Improvement Co., in turn, cited *Gray* v. *Powell*, 314 U.S. 402 (1941), in which the Court held that a "sale or delivery or offer of sale" of coal occurred, for purposes of the Bituminous Coal Act of 1937, 15 U.S.C. 828 *et seq.* (1940) (expired 1943, repealed 1966), where owners of land with established mining facilities leased the land, including mineral rights, to a large coal consumer; the landowners leased the mining facilities to a contractor selected by the consumer; and the contractor operated the mine under contract with the consumer. See *Gray*, 314 U.S. at 407-409; see also *United Gas Improvement Co.*, 381 U.S. at 400-401. Noting that the effect of that series of transactions was to deliver to the consumer the entire output of the coal mine, the Court rejected the argument that there was no "sale or delivery or offer for sale" because title to the coal never passed. *Gray*, 314 U.S. at 416. The Court concluded that the statute did not require a transfer of title "in the technical sense," and that to interpret the statute to contain such a requirement would hamper the statute's purposes. *Id.* at 414-417.

Nothing in Section 1673's reference to "merchandise * * * sold" precludes a similarly flexible interpretation that focuses on the substance, rather than the form or structure, of a transaction, to effectuate the purposes of the antidumping-duty statute.

b. Context confirms that the antidumping-duty statute does not unambiguously exempt contract-manufactured goods that enter the United States at less than fair value. See, *e.g.*, *Zuni Pub. Sch. Dist. No. 89* v. *Department of Educ.*, 127 S. Ct. 1534, 1546 (2007) ("[S]tatutory ambiguity is a creature not just of definitional possibilities but also of statutory context.") (internal quotation marks, citation, and brackets omitted). As an initial matter, the statute refers not only to merchandise that "is being * * * sold" but also merchandise that is "*likely* to be[] sold" at less than its fair value. 19 U.S.C. 1673(1) (emphasis added). In making an antidumping determination on the basis of "likely" sales, it may well be impossible to know in advance the form that the transaction will take, or the precise contractual terms between the producer and the consumer. It is implausible that Congress intended for the application of the antidumping-duty statute to "likely" sales of merchandise to turn on matters that are unknowable in advance of the consummation of the transaction.

Moreover, as amended in 1984, the antidumping-duty statute provides that the "reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of merchandise." 19 U.S.C. 1673. Enacted as part of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 602(b)(2), 98 Stat. 3024, that provision was "intended to clarify the applicability of [the unfair trade] laws to sham leases or leases which are

tantamount to sales." H.R. Rep. No. 725, 98th Cong., 2d Sess. 11 (1984). As the staff of the Senate Committee on Finance explained: "Import transactions may be structured in a variety of ways that may not be denominated as sales but are in fact permanent exchanges for valuable consideration. This section would ensure that these unfair trade practice laws are not avoided on the basis of form alone." Staff of Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. No. 98-219, Omnibus Tariff and Trade Measures: Explanation of Provisions Approved by the Committee on July 31, 1984, To Be Offered as a Committee Amendment to H.R. 3398*, at 22-23 (Comm. Print 1984).

Congress later enacted a provision setting out guidance regarding the application of the lease-sale provision of Section 1673. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1327, 102 Stat. 1204 (19 U.S.C. 1677(19)). That provision directs Commerce to consider a number of factors in applying the lease-sale provision, "including whether the lease transaction would permit avoidance of antidumping or countervailing duties." 19 U.S.C. 1677(19)(F). The House Conference Report explained that, "[i]n applying the provision, it is intended that Commerce and the ITC focus on commercial realities and the substance of the transaction, rather than its form," and that "[t]he scope of the term 'sale' should be broad enough to cover a wide variety of transactional arrangements." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 615-616 (1988).

Although the statute's lease-sale provision does not answer the precise question in this case, its text and history confirm that it was reasonable for Commerce to interpret the statutory reference to sales of foreign merchandise in a manner that focuses on "commercial reali-

ties and the substance of the transaction, rather than its form," H.R. Conf. Rep. No. 576, *supra*, at 616. It would be odd indeed if a statute that explicitly provides that merchandise that is *leased* to a customer may be considered to have been "sold," and thus subject to antidumping duties, were read *unambiguously* to exempt imported merchandise as to which the customer obtains permanent dominion, merely because the customer divided the acquisition of the merchandise into two transactions.

2. Commerce's interpretation effectuates the purposes of the antidumping-duty statute

Commerce's decision that merchandise produced by contract manufacturing falls within the reach of the antidumping-duty statute constitutes "a reasonable policy choice" at the second step of the *Chevron* analysis. 467 U.S. at 845.

a. The basic purpose of the antidumping-duty statute is to prevent or remedy injury to domestic industry harmed by, or threatened with harm by, unfair foreign competition. When Congress enacted the first version of the antidumping-duty law in 1921, Anti-Dumping Act, 1921 (1921 Act), ch. 14, 42 Stat. 9, it did so to "protect[] our industries and our labor against a now common species of commercial warfare of dumping goods on our markets at less than cost or home value if necessary until our industries are destroyed," H.R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921). When, in 1979, Congress repealed the 1921 Act, and reenacted the law as Title VII of the Tariff Act of 1930, see Trade Agreements Act of 1979 (1979 Act), Pub. L. No. 96-39, Tit. I, 93 Stat. 150; *id.* § 106, 93 Stat. 193, it reaffirmed its intent to protect domestic industry from unfairly priced foreign imports.

The Senate Report accompanying the 1979 Act explained that dumping is one of "the most pernicious practices which distort international trade to the disadvantage of United States commerce," and that the revisions to the antidumping-duty statute were designed, among other things, to provide for more effective relief for domestic industry. S. Rep. No. 249, 96th Cong., 1st Sess. 37 (1979).

b. As Commerce concluded in its determinations in this case, the harms that Congress sought to prevent are not lessened when a domestic consumer acquires foreign merchandise at unfairly low prices by making separate purchases of raw materials and manufacturing processes, as opposed to buying the finished product (and, thereby, all of its components) at once. See Pet. App. 232a, 239a-241a. The statute itself makes clear that unfair prices may be the result of undercharging for the cost of raw materials, of production processes, or both. See 19 U.S.C. 1677b(e)(1) (providing that, where the "normal value" of a good cannot be established by reference to the prices prevailing in foreign markets, the "constructed value" of the merchandise is based in part on "the cost of * * * fabrication or other processing of any kind employed in producing the merchandise," as well as "the cost of materials").

For purposes of the antidumping-duty law, whether a domestic customer pays for the raw materials and the production at the same time and pursuant to the same contract, or at different times under different contracts, is far less important than the end result: the importation of a finished product for a price. If that price represents less than the fair value of the product, then, no matter how the transaction was structured, any injury to domestic industry is the same. The transaction may

have displaced a sale that would otherwise have been made by domestic industry, or depressed the prices of domestic merchandise. As Commerce explained, to draw distinctions between merchandise obtained strictly via cash exchange and merchandise obtained through delivery of a combination of cash and raw materials would "expos[e] industries to injury by unfair trade practices without the remedy of" the antidumping-duty law, and thus "contravene the intent of Congress." Pet. App. 239a.

3. Commerce's interpretation prevents evasion of the statute

Commerce's decision also serves the important end of avoiding circumvention of the antidumping-duty law.

a. As Commerce recognized, the production of virtually all merchandise involves processing for which the parties could contract separately, in the same manner as under SWU contracts. Steel could be obtained by supplying iron ore for "smelting and rolling services"; lumber could be obtained by supplying trees for "harvesting and milling services"; semiconductors could be obtained by supplying silicon for "processing services." See Pet. App. 239a-240a. By focusing on the substance of such transactions rather than their form or structure, Commerce's interpretation of the statute avoids opening a loophole that would allow parties to evade antidumping duties simply by restructuring their transactions to avoid paying for raw materials and manufacturing in a single transaction.

This Court has endorsed similar approaches in analogous contexts. It has held that it is reasonable for an administrative agency to look behind the form of a transaction, including the parties' arrangements for

transfer of title, to determine whether there has been a "sale" of a particular commodity that is subject to federal regulation. See *United Gas Improvement Co.*, 381 U.S. at 400-401; *Gray*, 314 U.S. at 414-417; see also *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 466-467 (1969) (affirming the SEC's construction of the statutory term "purchase or sale of any security" under the antifraud provisions of the securities laws to include a stock swap accomplished during a merger). The Court likewise has frequently employed a "doctrine of substance over form" in which it "has looked to the objective economic realities of a transaction rather than to the particular form the parties employed" to evaluate its tax consequences, *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 572-573 (1978); see, *e.g.*, *Boulware* v. *United States*, 128 S. Ct. 1168, 1176 (2008). And the Court has applied a similar rule in evaluating the proper enforcement of other regulatory regimes. See, *e.g.*, *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 688 (1985) (noting that the Court has "decided a number of cases in which it looked to the economic substance of the transaction, rather than just its form, to determine whether" the securities laws applied).

In this case, Commerce understood that a rule that would allow form to trump substance would encourage industries to structure acquisitions of foreign merchandise in a manner that avoided imposition of antidumping duties. The result would be to eviscerate the protections that Congress intended to afford domestic industry by enacting the antidumping-duty statute. Commerce's determination sensibly avoids that result.

b. Respondents have argued (Eurodif Br. in Opp. 16-17, AHUG Br. in Opp. 22 & n.17) that Commerce's concerns about widespread circumvention are unfounded.

They contend that, even if Commerce cannot impose antidumping duties on contract-manufactured goods when they are first acquired by a U.S. customer, Commerce can always impose antidumping duties on domestic sales of merchandise that incorporates the imported materials. See Eurodif Br. in Opp. 16-17 (arguing that "the first downstream domestic sale of * * * an article in which [imported materials] were incorporated[] would trigger applicable dumping duties"). According to respondents, the uranium industry is an unusual exception to that rule because "the imported material (LEU) is consumed in a nuclear reactor and thus no sale in the United States occurs." *Id.* at 16.

Contrary to respondents' argument, that domestic utilities "consume" imported LEU in the production of electricity, rather reselling it in tangible form, does not render this case unique. A domestic entity might similarly "consume" processed steel, milled lumber, or semiconductors by using them in its own operations, *e.g.*, in equipment used to produce other items.

In any event, if foreign merchandise is not subject to an antidumping-duty order when it enters the United States, the subsequent sale of that merchandise in the United States does not trigger liability for antidumping duties. Upon entry of non-subject merchandise into the United States, liquidation (*i.e.*, processing) of the entry documents is not suspended pending final determination of antidumping duties, and no deposits of estimated antidumping duties are collected. 19 U.S.C. 1673b(d)(1)(B) and (d)(2).

Commerce refers to downstream sales in situations in which merchandise indisputably subject to antidumping duties has been sold by a foreign producer to an affiliated party in the United States. In such situations,

Commerce cannot calculate a dumping margin on the basis of the nominal price between the related parties. Commerce instead constructs an export price by taking the price of the first downstream sale by the U.S. purchaser to an unaffiliated customer in the United States, and subtracting expenses incurred after importation. 19 U.S.C. 1677a(e). Where, as here, there is no allegation that the foreign seller is affiliated with the U.S. purchaser, downstream sales would not be used to calculate dumping margins, and the existence or nonexistence of such sales would be irrelevant.

c. Although the prospect of the evasion of antidumping duties with respect to manufactured goods generally is a matter of considerable concern, it is of particular concern in the sensitive context of trade in enriched uranium. The proper application of the trade laws in this context serves important national security and foreign policy interests.

In particular, application of the antidumping-duty statute to imports of LEU provides the essential backdrop to a key element of this Nation's nuclear nonproliferation policy, the United States' Highly Enriched Uranium (HEU) Agreement with the Russian Federation. See Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons (HEU Agreement), Feb. 18, 1993, Hein's No. KAV 3503, State Dep't No. 93-59, 1993 WL 152921. Under the HEU Agreement, the Russian Federation has undertaken by 2013 to convert 500 metric tons of weapons-grade HEU—enough for approximately 20,000 Russian nuclear warheads—into LEU for use in generating electricity in the United States. In return, the United

States has agreed to purchase LEU downblended from 30 metric tons of weapons-grade HEU each year through 2013. See *ibid.*

The foundation for the HEU Agreement was laid in 1992, when Commerce agreed to suspend an antidumping investigation into Russian uranium that had been prompted by a surge of low-price Russian uranium imports into the United States. See *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,235 (1992) (notice of suspension of investigations and amendment of preliminary determinations). The antidumping suspension agreement restricts imports of Russian LEU produced through commercial enrichment processes, but exempts from those restrictions "any or all" HEU, and LEU produced through a process of downblending HEU "resulting from the dismantlement of nuclear weapons." *Id.* at 49,237.

The suspension agreement, which was negotiated in parallel with the HEU Agreement, provides an important incentive for the Russian Federation to produce LEU for export through a process of downblending, rather than through the less costly (and hence more profitable) method of enriching natural uranium through commercial processes. Russia is the largest enricher of uranium in the world, and enriching natural uranium for commercial LEU sales is the most economically viable use of its vast enrichment capacity. See Issues and Decision Memorandum for the Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation 6 (June 6, 2006) <http://ia.ita.doc.gov/frn/summary/RUSSIA/E6-8758-1.pdf> (Sunset Review Memorandum); *Final Results of Five-Year Sunset Review of Suspended Antidumping*

Duty Investigation on Uranium from the Russian Federation, 71 Fed. Reg. 32,517 (2006). Today Russia has substantially more enrichment capacity than necessary to supply its own domestic market, and other markets—notably in the European Union and Asia—have imposed restrictions on imports of Russian uranium products. Sunset Review Memorandum 6.

Absent full implementation of the suspension agreement, Russia would have a strong financial incentive to direct its enrichment capacity toward commercial enrichment of natural uranium for the U.S. market, rather than downblending weapons-grade uranium, for the same market at higher cost. Sunset Review Memorandum 6. But full implementation of the suspension agreement depends on full enforcement of the antidumping-duty law to imports of LEU, including LEU purchased pursuant to SWU contracts. See 19 U.S.C. 1673c(c) (generally limiting scope of suspension agreements to "subject merchandise").[6]

4. Commerce's now-withdrawn tolling regulation provides no basis for rejecting the agency's statutory interpretation

Respondents have argued (Eurodif Br. in Opp. 14-15; AHUG Br in Opp. 8-9, 20) that Commerce's decision in this case is inconsistent with its now-withdrawn tolling regulation. See 19 C.F.R. 351.401(h) (2007) (providing that Commerce will "not consider a toller or subcontrac-

---

[6] The CIT is currently reviewing a challenge to Commerce's decision not to terminate the Russian suspension agreement, in which the plaintiffs have argued that, under the court of appeals' decision in this case, the suspended investigation must exclude LEU obtained pursuant to SWU contracts. *Techsnabexport* v. *United States*, 515 F. Supp. 2d 1363, 1367-1370 (Ct. Int'l Trade 2007).

tor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise"), withdrawn by 73 Fed. Reg. 16,517 (2008). Respondents are incorrect.

By its terms, the tolling regulation (even when it was in effect) had no bearing on the question presented here. See Pet. App. 17a-24a, 27a. The regulation appeared in a section of Commerce's regulations that "establishes certain general rules that apply to the calculation of export price, constructed export price and normal value." 19 C.F.R. 351.401(a). Thus, as the CIT itself acknowledged, while the tolling regulation provided guidance for calculating the dumping margin for goods within the scope of the antidumping-duty law, it "[did] not provide a basis to exclude merchandise from the scope of an [antidumping] investigation." Pet. App. 191a (citation omitted); see *id.* at 235a-236a.[7]

Respondents have also relied (Eurodif Br. in Opp. 14-15, 17; AHUG Br. in Opp. 9 & n.9, 20 & n.13) on administrative decisions in which Commerce applied the tolling regulation to identify the sale between contractor and buyer, as opposed to the sale between subcontractor and the contractor, as the relevant sale for purposes of calculating the dumping margin. Respondents emphasize, as did the CIT, that in one such decision, Commerce stated that it "do[es] not consider the 'sale' be-

---

[7] The CIT in this case did, however, reject Commerce's conclusion that the tolling regulation does not apply in determining whether domestic utilities qualify as producers for purposes of export-price calculations. Pet. App. 50a-56a. The Federal Circuit did not address that ruling, see *id.* at 27a, and it is not at issue here. Commerce withdrew the tolling regulation in response to the CIT's misreading of the regulation. See 73 Fed. Reg. at 16,517.

tween the subcontractor and * * * a contractor to be a sale of subject merchandise at all," but rather to be "a sale of certain inputs and subcontracting services." Pet. App. 193a-194a (quoting Response to Court Remand at 5, *Taiwan Semiconductor Mfg. Co.* v. *United States*, 143 F. Supp. 2d 958 (Ct. Int'l Trade 2001) <http://ia.ita.doc.gov/remands/00-48.htm>).

But the question in those cases was not whether there was a "sale" of merchandise for purposes of application of the antidumping-duty law; it was whether a particular sale qualified as the "*relevant* sale" for purposes of calculating the dumping margin in accordance with Commerce regulations. 19 C.F.R. 351.401(h) (2007) (emphasis added). And as Commerce explained in this case in its determination on remand from the CIT, in its prior decisions Commerce had always confronted that question in the context of situations in which "both the toller and the tollee would make sales that could be construed as sales of subject merchandise"; Commerce applied the tolling regulation to select the tollee as the respondent "producer" for purposes of constructing the relevant export price. Pet. App. 122a-124a. That selection reflected the agency's "preference [for] select[ing] the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise)." *Id.* at 128a.

Commerce further explained, however, that in no instance did the agency apply the regulation to determine that the tolling transactions were entirely beyond the reach of the antidumping-duty law. Pet. App. 112a, 235a. To the extent that the language of the agency's prior decisions might have suggested that the transaction between toller and tollee could *never* result in a relevant sale for purposes of calculating the dumping mar-

gin, Commerce reasonably determined that such a result in this case would frustrate the purpose of the regulation and of the antidumping-duty statute in a situation where, as here, the tollee does not sell the toll-produced merchandise. *Id.* at 124a, 128a-129a, 157a-158a.

Commerce's determination not to allow prior decisions concerning dumping-margin calculations to control the threshold question whether the antidumping-duty statute applies at all was a reasonable choice, given the breadth and flexibility of the statutory scheme. The statute provides Commerce with a wide array of tools with which to determine the difference between the price of the imported merchandise with the value of that same (or comparable) merchandise in the home market. Although Commerce normally establishes the dumping margin by comparing the prices of sales in each market, the statute provides a broad range of alternatives where prices are not available for that purpose.

For example, the price of the merchandise imported into the United States can be established on the basis of the price charged upon export (19 U.S.C. 1677a(a)), the price at which a reseller in the United States who is affiliated with the foreign producer first resells the merchandise in the U.S. market (19 U.S.C. 1677a(b)), or the price of a lease equivalent to a sale (19 U.S.C. 1673). Where the imported merchandise is transferred to a related party in the United States that incorporates it into a different product that is sold in the United States, Commerce may use the price at which merchandise comparable to the imported merchandise is sold, or "any other reasonable basis." 19 U.S.C. 1677a(e).

Similarly, the statute permits Commerce to determine the value of the comparable merchandise in the home market (*i.e.*, "normal value") on the basis of actual

home market prices of such merchandise (19 U.S.C. 1677b(a)(1)(B)); the price of merchandise when sold to third countries (19 U.S.C. 1677b(a)(1)(C)); the constructed value of the merchandise sold in the United States (19 U.S.C. 1677b(a)(4)), based on, *inter alia*, costs of materials and fabrication (19 U.S.C. 1677b(e)); in the case of non-market economy countries, the constructed value of the merchandise based on the factors of production in the home market, as valued in a market economy country (19 U.S.C. 1677b(c)(1)); and the price of comparable merchandise sold in other countries (19 U.S.C. 1677b(c)(2)). As Commerce explained, the statute's provisions concerning the calculation of dumping margins are consistent with the principle that "the form of the sale" need not control "the application of the law." Pet. App. 232a.

In short, nothing in Commerce's prior applications of the tolling regulation undermines Commerce's reasonable conclusion that the antidumping-duty statute covers imports of foreign merchandise produced via contract manufacturing. Those decisions concerned a question—namely, how to calculate antidumping duties—that is logically distinct from the threshold question whether the antidumping-duty statute applies at all. And to the extent that the language of Commerce's prior decisions is in tension with its determination that the antidumping-duty statute applies to the merchandise at issue in these proceedings, Commerce was entitled to exercise its expert judgment in resolving that tension. As this Court explained in *Chevron*, an "agency interpretation is not instantly carved in stone. On the contrary, the agency * * * must consider varying interpretations and the wisdom of its policy on an ongoing basis." *Chevron*, 467 U.S. at 863-864. "Agency inconsis-

tency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework"; "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency.'" *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)). Commerce in this case fully explained its reasons for declining to embrace the full possible implications of the language in its prior tolling decisions, which would frustrate Commerce's ability to give the antidumping-duty statute its intended scope.

C. Additional Reasons Identified By Commerce After Reviewing the Contracts And Other Record Evidence Support Its Decision To Impose The Antidumping Duties At Issue

Commerce's decision to focus on the substance, rather than the form or structure, of contract-manufacturing arrangements reflects a permissible interpretation of the statutory text and a reasonable policy choice to which the court of appeals should have deferred. But even if the antidumping-duty statute's reference to the "sale" of merchandise can be read unambiguously to require something more than the facts that are present in contract-manufacturing transactions generally—that is, the delivery of a newly produced good to a customer that ordered its manufacture, in return for consideration—the court nevertheless erred in overriding Commerce's determination in this case. After examining "the contracts and other evidence of record," Commerce identified salient features of SWU transactions that

make it particularly clear that the transactions "represent the transfer of ownership in the complete LEU product for consideration." Pet. App. 131a. That determination, concerning a matter within the agency's expertise, is reasonable, and warrants deference as well.

1. Commerce reasonably disregarded the fiction that enrichers merely return the customer's unenriched uranium in enriched form

When Commerce examined the SWU contracts and other record evidence in accordance with the CIT's remand instructions (Pet. App. 69a-177a), it made two findings of particular relevance here: (1) that, although utility customers hold title to the natural uranium feedstock they provide to the enrichers, title to the finished LEU passes to the utilities only upon delivery of the LEU, and (2) that, because enrichers treat feedstock as fungible, the LEU delivered to the customer bears no necessary relationship to the feed uranium that the customer provided to the enricher. *Id.* at 131a-134a. The finished LEU product the customer receives is not simply the customer's own original unenriched uranium, returned in enriched form; the result of a SWU transaction is that a utility that originally had title to a particular lot of raw material ends up with title to a lot of finished LEU that bears no necessary relationship to the raw material it furnished (along with cash) to the enricher.

a. After examining the contracts and other evidence, Commerce concluded that "the utility customers hold title to the natural uranium feedstock that they provide to the enrichers," but that they do not have or receive title to the finished LEU immediately upon its production. Pet. App. 132a ("The contracts state that the

enrichers transfer title to the LEU to the utilities upon production and delivery of the LEU."); *id.* at 133a ("[A]t the point in time in which the enricher produces the LEU but before delivery is performed, the customer * * * does not hold title to the LEU."); see, *e.g.*, C.J.A. 17, 333. The enricher bears the risk of loss with respect to the LEU until it is delivered. Pet. App. 256a; see, *e.g.*, C.J.A. 18, 189. Commerce further found that the utility's title to the quantity of feedstock furnished to the enricher is extinguished upon receipt of the LEU. Pet. App. 132a; see, *e.g.*, C.J.A. 17, 188.

The courts below understood the arrangements in similar terms. See Pet. App. 20a (explaining that "the utility retains title to the quantity of unenriched uranium that it supplies to the enricher," and that title in the feedstock "is only extinguished upon the receipt of title in the LEU for which [the utility] contracted"); see *id.* at 44a (citing discussion noting that "title passes to the enriched product" only when "it is returned in enriched form") (citation omitted). Commerce therefore reasonably determined that, upon production of the LEU, "the enrichers own the LEU, including the right to sell the LEU at issue to any buyer." *Id.* at 133a-134a.

b. Commerce acknowledged that the contractual provisions "establish[] a legal fiction that the enrichment process will be performed on the uranium provided by the customer." Pet. App. 133a (citation omitted). As explained above, see pages 25-44, *supra*, Commerce reasonably concluded that the legal fiction, even if accepted, would not exempt the finished product from the antidumping-duty statute. But Commerce also concluded that, in this case, the fiction did not comport with fact; the record made clear that the contracts were dedicated

to delivery, for consideration, of the complete LEU product, and not only the manufacturing component.

Record evidence shows that, when a customer arranges for the delivery of unenriched uranium under a SWU contract, the enricher does not segregate the customer's feed uranium for separate processing, but adds it to its store of feed uranium. *E.g.*, J.A. 121, 265; C.J.A. 17; see Pet. App. 133a. Although the customer retains title to the feed uranium it had delivered to the enricher, the enricher's commingling of the feedstock means that the customer cannot demand return of the specific lot of feed uranium it had supplied. See *ibid.*

Nor, in fulfilling its obligations under the contract, is the enricher necessarily limited to processing the specific *quantity* of feed uranium the customer had supplied. To produce the finished LEU product, the enricher may use more or less feed uranium than the customer had supplied, Pet. App. 253a, and, indeed, may deliver the finished LEU product *before* it ever receives feed uranium from the customer, *id.* at 133a. The operation of the SWU contract scheme thus "mak[es] it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer." *Ibid.* Respondents have acknowledged that, at the time the LEU is imported into the United States, the enricher generally does not know the utility to which a specific shipment of LEU is to be delivered, or whether its production was governed by a SWU contract or an EUP contract. See J.A. 304-306; J.A. 299 ("[I]mports of LEU frequently are not allocated to specific SWU contracts or orders prior to importation—or even at the time of entry."). They have also acknowledged that the enricher generally ships the LEU to a nuclear fuel fabricator in the United States

and "delivers" the LEU to the customer by directing the fabricator to make a book transfer of the LEU to the customer's account. J.A. 299-300; see, *e.g.*, C.J.A. 15, 332, 470.

Based on this evidence, Commerce reasonably concluded that it is in fact a complete LEU product that is "sold" as a result of a SWU contract, and not only the enrichment component. Although, as Commerce acknowledged, the utilities' provision of feed uranium "may not be a payment-in-kind in the formal sense under these contracts, * * * the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU." Pet. App. 254a. By providing a combination of raw materials and monetary payment as consideration, a utility obtains title to a lot of finished LEU product that bears no necessary relation to the unenriched uranium the utility furnished to the enricher. Commerce determined, based on that arrangement, that, "[b]etween the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the *complete* LEU product." *Id.* at 133a (emphasis added). And enrichers "sell" that product "when they transfer ownership of the *complete* LEU to the utilities through delivery of such merchandise for consideration." *Id.* at 134a (emphasis added).

c. That SWU transactions result in the passage of title to a finished product that bears no necessary relationship to the customer's raw materials makes amply clear that SWU transactions are permissibly termed "sales." Similar usages of the term were common long before the antidumping-duty statute was enacted. This Court, in *Powder Co.* v. *Burkhardt*, 97 U.S. 110 (1878), concluded that the question of fungibility is what distin-

guishes a common-law "bailment" from a "sale." The Court explained:

> [W]here logs are delivered to be sawed into board, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law.

Id. at 116; accord *Sturm* v. *Boker*, 150 U.S. 312, 329-330 (1893); see, *e.g.*, *B.A. Ballou & Co.* v. *Citytrust*, 591 A.2d 126, 130 (Conn. 1991). Although the Congress that drafted the antidumping-duty statute may not have specifically meant, by the use of the word "sold," thereby to incorporate the definition of "sale" prevailing in the law of bailments, that definition is at least one permissible way to understand the text of the antidumping-duty statute.

Of course, the fungibility of raw materials makes little difference as a matter of statutory policy; whether the manufacturer delivers a product that contains the customer's own raw materials, or merely materials that are equivalent to those the customer had supplied, is largely irrelevant from the standpoint of protecting domestic industry from the harms of unfair foreign price competition. But if it was somehow unreasonable for Commerce to conclude that imported merchandise produced pursuant to contract-manufacturing transactions,

without more, may be considered "merchandise * * * sold" within the meaning of Section 1673, it surely was reasonable for Commerce to conclude that *these* contract-manufacturing transactions, under which utilities exchange money and a quantity of raw materials for title to a quantity of finished LEU that bears no necessary relationship to the raw materials the customer had provided, result in merchandise being "sold" within the meaning of the statute.

2. The court of appeals erred in assigning dispositive significance to the absence of contractual provisions explicitly vesting title in the enricher

Addressing Commerce's review of the record in this case, the court of appeals overrode Commerce's application of the antidumping-duty statute based on the court's own determination that the parties to SWU transactions do not intend to vest ownership of the raw materials or the finished merchandise in the enricher "during the relevant time periods that the uranium is being enriched." Pet. App. 20a. The court concluded that, absent evidence of "any intention by the parties to vest the enrichers with ownership rights in * * * the finished LEU," enrichers cannot be said to "sell" LEU to utilities pursuant to SWU contracts. *Ibid.* That conclusion is incorrect.

As a preliminary matter, the Federal Circuit's ruling is directly contrary to Commerce's finding, based on the contracts and other record evidence, that, "between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product." Pet. App. 133a. Commerce's finding on that point is supported by substantial evidence. But

even leaving that agency finding aside, the Federal Circuit's determination is in considerable tension with the facts that utilities do not receive title to the LEU immediately upon its production, and that the utilities have no title to the specific lot of feed uranium used to produce that LEU. *Id.* at 20a, 44a, 132a, 133a. Those facts support Commerce's determination that, when title to the finished LEU passes to the utility, it passes from the enricher. The court of appeals nevertheless dismissed that conclusion, without so much as attempting to offer an alternative explanation for the identity of the party from whom title passes to the purchasing utility. *Id.* at 20a.

But more fundamentally, even assuming *arguendo* that the Federal Circuit was correct that the enricher never formally acquires title to the LEU, there is no basis in the statute for requiring that the parties provide for title to vest in the manufacturer before a SWU-type transaction can be considered a "sale" of "foreign merchandise," namely, finished LEU. The antidumping-duty statute only asks, in the passive voice, whether foreign merchandise "is being * * * sold." 19 U.S.C. 1673(1). It does not unambiguously require proof of the parties' intention to vest any particular party with title to the merchandise before the customer obtains title. It is undisputed that, under a SWU-type arrangement, a utility provides raw materials and monetary consideration to the enricher and, in exchange, receives delivery of and title to finished LEU that is not necessarily traceable to the particular lots of uranium feedstock supplied by the utility. Pet. App. 20a, 131a-132a. In these circumstances, Commerce acted reasonably in concluding that what occurs is a sale.

Finally, the court of appeals' inquiry into the parties' intentions with respect to ownership rights is particularly misplaced in the context of a regime designed to remediate unfair trade practices. The intent of parties to a contract is of course an important consideration in the law of contracts. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 911 (1996) (Breyer, J., concurring). But giving dispositive effect to private documents or intentions in determining whether a federal regulatory regime applies to the product of parties' dealings would permit the parties to decide for themselves whether to opt in or out of regulation.

Commerce's decision avoids that absurd result, and in a manner that is consistent with statute's text and that advances the statute's purposes of protecting domestic industry from the harms of unfair foreign competition. The court of appeals erred in overriding its determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN B. BELLINGER, III
Legal Adviser
Department of State

DANIEL J. DELL'ORTO
Acting General Counsel
Department of Defense

LILY FU CLAFFEE
General Counsel

JOHN D. MCINERNEY
Chief Counsel for Import Administration

DAVID R. MASON, JR.
Senior Counsel

QUENTIN M. BAIRD
Attorney
Department of Commerce

DAVID R. HILL
General Counsel
Department of Energy

GREGORY G. GARRE
Acting Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

LEONDRA R. KRUGER
Assistant to the Solicitor General

JEANNE E. DAVIDSON
PATRICIA M. MCCARTHY
STEPHEN C. TOSINI
Attorneys

JULY 2008

APPENDIX

STATUTORY PROVISION INVOLVED

19 U.S.C. 1673 provides:

Imposition of Antidumping Duties

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.